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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

EPIC GAMES, INC.,

**Plaintiff, Counter-defendant,
v.**

APPLE INC.,

Defendant, Counterclaimant,

Case No. 4:20-cv-05640-YGR-TSH

**EPIC GAMES, INC.'S
OPPOSITION TO APPLE INC.'S
MOTION TO STRIKE WRITTEN
AND ORAL TESTIMONY OF DR.
MICHAEL I. CRAGG**

The Honorable Yvonne Gonzalez Rogers

1 Apple Inc.’s (“Apple”) Motion to Strike is an attempt to have the Court reconsider its
 2 prior ruling, and to allow Apple to rely on Spotify USA Inc.’s (“Spotify”) production
 3 offensively while denying Epic Games, Inc. (“Epic”) the opportunity to respond. The facts,
 4 which Apple’s motion obscures, are that *both* Parties subpoenaed the Spotify data at issue and
 5 then it was Apple, not Epic, that decided to have its experts rely on it; it was Apple, not Epic,
 6 that prevented Spotify from testifying in this Action; and it was Apple, not Epic, that decided to
 7 withhold, rather than produce, any Apple materials responsive to the Spotify [REDACTED] at
 8 issue (to the extent such materials exist). Apple’s attempt to strike Dr. Michael Cragg’s
 9 testimony is both procedurally improper and substantively flawed. Apple has now stipulated
 10 *twice* to the admissibility of that specific testimony, the Court has already rejected Apple’s
 11 attempt to strike related portions of Dr. Cragg’s testimony (ECF No. 614 at 11), and the
 12 testimony is substantively sound under Rule 703—as Dr. Cragg testified, [REDACTED]
 13 [REDACTED] (Cragg Trial
 14 Tr. 2335:20-24.) Apple’s motion therefore should be denied.

15 *First*, Apple’s Motion engages in revisionist history. Apple argues that Spotify’s JFTC
 16 submissions are wholly irrelevant to this case, but Apple took a contrary position in discovery,
 17 when it requested that Spotify produce these very documents. In December 2020, Apple (as
 18 well as Epic) served a document subpoena on Spotify, seeking documents relating to Spotify’s
 19 usage data *and its submissions to regulators concerning Apple’s practices*. (Stuckey Decl.
 20 ¶¶ 3-4, Ex. A (Epic RFP Nos. 3 & 12), Ex. C (Apple RFP Nos. 3 & 33).) In February 2021,
 21 Spotify made a series of productions in response to the Parties’ subpoenas. (Stuckey Decl.
 22 ¶¶ 9-10, 12.) However, Spotify clawed back certain materials at the request of a foreign
 23 regulator, including some of the underlying data supporting the JFTC submissions, but not the
 24 JFTC submissions themselves. (Stuckey Decl. ¶ 11.)

25 Apple also claims that Apple was denied an opportunity to test the accuracy of Spotify’s
 26 JFTC submissions because *Epic* did not subpoena a Spotify witness to testify about the Spotify
 27 documents. If Apple believed it needed to depose a Spotify witness, it was up to *Apple* to
 28 subpoena one; Apple never even tried. Epic, by contrast, *did* serve Spotify with a deposition

1 subpoena in January 2021. (Stuckey Decl. ¶ 5, Ex. D.) Spotify agreed to make a witness
 2 available for deposition—a senior executive based in Sweden—but was unable to make that
 3 witness available until February 19, 2021, just four days after the close of fact discovery.
 4 (Stuckey Decl. ¶ 6.) Epic sought Apple’s agreement to conduct the deposition after the fact
 5 discovery deadline had passed, *but Apple refused to accommodate the Spotify witness’s*
 6 *availability.* (Stuckey Decl. ¶ 7, Ex. E.) Epic also sought to secure a trial witness from Spotify,
 7 but Spotify was unwilling to provide one. (Stuckey Decl. ¶ 8.) Apple made no such attempt.
 8 Apple’s supposed inability to cross-examine a Spotify witness about its JFTC submissions or
 9 the underlying data from Spotify’s [REDACTED] is a result of Apple’s own refusal to
 10 accommodate the deposition availability of Spotify’s witness.

11 *Second,* Apple repeats its complaint—already rejected by the Court—that Dr. Cragg
 12 disclosed his opinions relying on the Spotify documents only in his written rebuttal testimony.
 13 As Epic has previously explained (ECF No. 536 at 6-10), and as the Court previously found
 14 (ECF No. 614 at 11), Dr. Cragg’s response was well within the scope of permissible responses
 15 to new analysis offered by Prof. Lorin Hitt for the first time in Prof. Hitt’s own rebuttal report.
 16 Specifically, Prof. Hitt did not offer *any* Spotify-related opinions in his opening report. Instead,
 17 in March 2021, when the Parties exchanged rebuttal reports, Prof. Hitt for the first time offered
 18 a new analysis based on the Spotify data, claiming that data shows a lack of “friction”. Dr.
 19 Cragg, in his rebuttal written direct, made two modest observations about the new Spotify
 20 analysis offered by Prof. Hitt: (i) that Prof. Hitt (again) misrepresented the data he relied on
 21 (Ex. Expert 13 ¶¶ 69-70 (Cragg)); and (ii) that the Spotify [REDACTED] directly contradicts Prof.
 22 Hitt’s opinions (*Id.* ¶ 71)). On April 28, 2021, Apple objected to portions of the former
 23 opinion, but *stipulated to* the admissibility of the opinion it now challenges. (ECF No. 518 at
 24 6-7; ECF No. 519 at 2.) On May 9, 2021, the Court overruled Apple’s objections as to *all* of
 25 Dr. Cragg’s responses concerning Spotify. (ECF No. 614 at 11.)

26 Apple then *again* expressly waived its objection to Dr. Cragg’s reliance on the Spotify
 27 documents on May 12, 2021, as part of a *quid pro quo* between the Parties. Specifically, the
 28 Parties filed a stipulation and proposed order agreeing to the admission into evidence of certain

1 documents relied on by Dr. Cragg. The stipulation stated the Parties’ “understanding that Drs.
 2 Barnes, Cragg, Hitt, Lafontaine, and Rubinfeld may rely on information not admitted into the
 3 record, consistent with Rule 703, and that *the parties will not object to those experts’ reliance*
 4 *on such unadmitted materials within the scope of Rule 703 except as otherwise expressly set*
 5 *forth herein*”. (ECF No. 641 at 2 (emphasis added).) Apple was well aware that this
 6 stipulation relinquished any objection to Dr. Cragg’s reliance on the Spotify documents
 7 mentioned in his written direct testimony, and Apple so stipulated because Epic withdrew
 8 similar objections as to Apple’s witnesses in return. By stipulating in the May 12, 2021 filing
 9 that it would not object to the Spotify documents on Rule 703 grounds, Apple *again* waived the
 10 very objection it now asserts. Having lost a challenge to related testimony and stipulated *twice*
 11 to the specific testimony at issue, and having agreed to drop any objections as part of an
 12 agreement with Epic, Apple should not be allowed *another* bite at the apple. Epic respectfully
 13 requests that the Court reject Apple’s attempt to relitigate this issue.

14 *Third*, even if Apple’s arguments were preserved (and they were not), they would fail
 15 under Rule 703. “Rule 703 allows an expert witness to form an opinion based on facts or data
 16 either before or at the hearing”, and “[t]he facts or data relied upon need not be otherwise
 17 admissible if they are ‘of a type reasonably relied upon by experts in a particular field’”. *Scott*
 18 *v. Ross*, 140 F.3d 1275, 1286 (9th Cir. 1998); Fed. R. Evid. 703 (“An expert may base an
 19 opinion on facts or data in the case that the expert has been made aware of or personally
 20 observed.”). Courts give experts “‘great liberality’ . . . in determining the basis of their
 21 opinions”. *K&N Eng’g, Inc. v. Spectre Performance*, 2011 WL 13131157, at *10 (C.D. Cal.
 22 May 12, 2011). “The fact that [an expert’s] opinions are based on data collected by others is
 23 immaterial; [FRE] 703 expressly allows such opinion testimony.” *Southland Sod Farms v.*
 24 *Stover Seed Co.*, 108 F.3d 1134, 1142 (9th Cir. 1997). “[H]ow [the expert’s] opinion should be
 25 weighed in light of his reliance on [such] data can be explored through cross-examination.”
 26 *BladeRoom Grp. Ltd. v. Facebook, Inc.*, 2018 WL 1611835, at *3 (N.D. Cal. Apr. 3, 2018).

27 The studies containing Spotify’s business data fall clearly within the scope of Rule 703.
 28 *See, e.g., United States v. W.R. Grace*, 504 F.3d 745, 761 (9th Cir. 2007) (reversing where

1 district court excluded expert testimony based on data found in certain EPA studies); *RePET, Inc. v. Zhao*, 2018 WL 3372749, at *3 (C.D. Cal. Mar. 20, 2018) (holding that business records, including “general ledger detail, tax returns, invoices and other records including minutes of shareholder and board of director meetings, stock ledgers and certificates, invoices, and correspondence with third party companies”, were proper Rule 703 material). Data studies are the type of material regularly relied on by economists like Dr. Cragg, who testified at trial that the Spotify data [REDACTED]

8 [REDACTED]. (Cragg Trial Tr. 2335:16-24.)

9 Apple cites two decisions finding that experts cannot rely on “*opinions* developed by
10 *another* expert for the purposes of litigation”, in contrast with the “facts and data” permitted by
11 Rule 703. *See, e.g., In re Imperial Credit Indus., Inc. Sec. Litig.*, 252 F. Supp. 2d 1005, 1012
12 (C.D. Cal. 2003) (emphases added). But Dr. Cragg testified to *his own opinions* based on
13 Spotify’s data. [REDACTED]

14 [REDACTED] (Cragg Trial Tr. 2339:16-23.)

15 Apple had ample opportunity to (and did) cross-examine Dr. Cragg about his opinions and the
16 data he relied on at trial. Apple’s Motion also faults Dr. Cragg for not considering Apple’s
17 response to Spotify’s JFTC submissions, but Apple never *produced* in this litigation any such
18 responsive material (if it even exists). As noted above, it was Apple that injected this issue into
19 the case by presenting an analysis based on Spotify’s usage data in Prof. Hitt’s rebuttal report.
20 Yet Apple chose to ignore the Spotify [REDACTED] contradicting Prof. Hitt’s opinions. Apple
21 could have deposed Spotify about its [REDACTED] but chose not to. Apple could have produced
22 its response to Spotify’s JFTC submissions, but chose not to. Apple could have asked Prof.
23 Hitt to present an analysis critiquing the Spotify [REDACTED], but chose not to. Apple could
24 have refrained from using the Spotify data altogether, offensively or defensively, but chose not
25 to. Apple should not be permitted to have its expert rely on cherry-picked portions of Spotify’s
26 production as a sword, yet deny Epic’s expert the ability to rely on other portions of that
27 production to show the fallacy of Apple’s claims.

28 For these reasons, Apple’s motion to strike should be denied.

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2 Dated: May 17, 2021

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10 Respectfully submitted,

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13 Epic Games, Inc.

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